

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH GHEE II,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 261556

Wayne Circuit Court

LC No. 04-009919-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of assault with intent to murder, MCL 750.83, and one count each of intentional discharge of a firearm from a vehicle, MCL 750.234a, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor failed to exercise due diligence to produce a requested “res gestae” witness and that the trial court, therefore, erred in refusing to give a missing witness instruction. We disagree.

The record indicates that Officer Jitu Green of the Detroit Police Department was endorsed by the prosecution as a witness to be called at trial. However, at trial the prosecutor indicated that Green had recently been suspended from the police department and that her efforts to locate him for purposes of trial had been unsuccessful. Arguing that as a “consequence” of the prosecutor’s failure to produce this “res gestae” witness defendant was entitled to a missing witness instruction, counsel for defendant requested that the jury be instructed that it could presume Green’s testimony would have been adverse to the prosecution. See CJI2d 5.12. The trial court, however, declined to so instruct the jury.

We initially note that Green was not, as defendant contends, a res gestae witness. A res gestae witness is someone who witnessed some event in the continuum of the criminal transaction and whose testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Here, the record indicates that Green did not arrive at the scene of the shooting that formed the basis for defendant’s convictions until after the crimes had taken place and the perpetrator had fled the scene. Nonetheless, regardless whether Green was a res gestae witness, defendant is correct that because the prosecutor endorsed Green as a witness to be called by her at trial, she was obligated

to exercise due diligence to produce the officer at trial. See *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Defendant is also correct that a missing witness instruction is often appropriate where a prosecutor fails to exercise such diligence to secure the presence at trial of a listed witness. *Id.*; see also *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). Under the circumstances of this case, however, we do not find the trial court's refusal to so instruct the jury constitutes error requiring relief.

Generally, this Court reviews a trial court's decision regarding due diligence and the appropriateness of a missing witness instruction for an abuse of discretion. *Eccles, supra* at 389. However, defendant failed to challenge the sufficiency of the prosecutor's efforts to locate Green below. Accordingly, he will not be heard on appeal to complain of an alleged deficiency in the prosecutor's efforts to locate and produce Green. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) (a defendant "may not harbor error as an appellate parachute"). Regardless, even were we to conclude that the prosecutor failed in her burden to exercise due diligence to locate and produce Green, and that a missing witness instruction was therefore appropriate, we would nonetheless find that reversal of defendant's convictions is not warranted. A preserved nonconstitutional error is not grounds for reversal unless it is shown by the defendant that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-497; 596 NW2d 607 (1999). Here, defendant makes no attempt to explain the effect of Green's absence on his overall trial strategy or the outcome of the case, and has thus failed to establish a reasonable probability that the trial court's refusal to provide an adverse witness instruction affected the trial's outcome. *Id.* To the contrary, we note that Green's partner, Officer Roland Brown, testified at trial regarding the investigation conducted by the officers at the scene, and defendant offers nothing to show that Green could have added anything helpful to the trial court proceedings. We additionally note that there was strong evidence to support that defendant, who was identified as the shooter by two of the four victims at trial, committed the charged crimes in retaliation for a confrontation with one of the victims earlier that day. Thus, while the requested instruction would have allowed the jury to presume that Green's testimony would have been adverse to the prosecution, in light of the evidence presented it is unreasonable to conclude that such a presumption would have altered the outcome of the case.

Defendant next argues that his convictions must be reversed because the trial court erred in permitting defendant to be impeached with his prior conviction for attempted unlawful driving away of an automobile (UDAA), MCL 750.413. Again, we disagree.

MRE 609 prohibits the admission of evidence that a witness was convicted of a crime for the purpose of attacking the witness' credibility, unless the crime contained an element of dishonesty, false statement, or theft, was punishable by imprisonment for more than one year, the trial court determines that the evidence has significant probative value on the issue of credibility, and, where the witness is a defendant in a criminal trial, the trial court also determines that the probative value of the evidence outweighs its prejudicial effect. MRE 609(a). This Court has held, and defendant does not dispute, that UDAA is a theft crime and may be used to impeach a witness under MRE 609(a)(2). *People v Dixon*, 175 Mich App 472, 477; 438 NW2d 303 (1989).

As defendant argues, however, in concluding that his prior conviction was admissible to impeach him should he testify at trial, the trial court failed to articulate its analysis of the conviction's probative weight versus its prejudicial effect. MRE 609(b) provides:

For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. *The court must articulate, on the record, the analysis of each factor.* [Emphasis added.]

Although the trial court did conclude that the prior conviction was “more probative than prejudicial,” it did not conduct an analysis on the record of the degree to which the conviction was indicative of veracity, or the possible effect of admitting the conviction on defendant's decision whether to testify, as required by MRE 609(b). However, as recognized by this Court in *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005), a “trial court's failure to articulate on the record its analysis of these factors does not require reversal if the trial court was aware of the pertinent factors and of its discretion.” Here, the trial court expressly addressed several of the factors to be considered under MRE 609, including the age of the conviction and the dissimilarity of the prior and the current offenses and, as noted above, ultimately concluded that the probative value of the prior conviction was not outweighed by its prejudicial effect. The trial court's ruling thus indicates that the court was aware of its discretion to admit the evidence of defendant's UDAA conviction, and was equally aware of the factors involved in the determination. Accordingly, its failure to expressly articulate its analysis of the probative value versus prejudicial effect of the prior conviction does not require reversal. See *id.*

Moreover, even assuming that evidence of his prior conviction was erroneously admitted, defendant again has the burden of demonstrating that such error was not harmless, i.e., that it is more probable than not that the error was outcome determinative. *Lukity, supra.* Here, it is apparent that the trial court's ruling did not dissuade defendant from testifying, and reference to defendant's UDAA conviction was limited. Given these facts, and considering the weight of the evidence against defendant as discussed above, it is not more probable than not that any error in permitting evidence of defendant's prior conviction affected the verdict. *Id.*

Defendant finally argues that he was denied his right to present a defense and to confront the witnesses against him when the trial court precluded defendant's cross-examination of Jason Smith regarding whether drugs were sold from the home at which the shooting occurred. We disagree. Because defendant failed to raise these constitutional claims at trial, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

A criminal defendant enjoys the constitutional right to both confront the witnesses against him and to present a defense. See US Const, Am VI; see also *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). In arguing that the trial court deprived him of these rights by precluding cross-examination of Smith regarding whether drugs were sold from the home, defendant asserts that evidence of Smith's knowledge that drugs were sold out of the house would have supported a defense theory that Smith had a motive to falsely identify defendant as the person who committed the charged offenses, i.e., to conceal the fact that the shooting was in reality the result a “turf war” over the sale of drugs in the area. We note, however, that defendant failed to make an offer of proof sufficient to establish that had he been permitted to pursue this line of questioning, Smith, or for that matter any other witness, would have

acknowledged that drugs were in fact sold from the house. Rather, in seeking to pursue this line of questioning defense counsel indicated merely that defendant “believe[d] that th[e] shooting was the result of drug activity at [the home,]” and that he wished “to develop that area.” Because defendant failed to provide the trial court with a factual basis sufficient to support the proposed line of inquiry, we find no error from which relief may be granted. See MRE 103(a)(2) (providing that error may not be predicated upon a ruling that excludes evidence, unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by an offer of proof).

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray